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No. 90-341

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

DAVID ROSENBERG, GINA M. DAVIDSON, VICKIE COLLINS and PAMELA J. THURMAN,
Petitioners,

vs.

CITY OF LORAIN, OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARK J. MIHOK
Counsel of Record
100 W. Erie Avenue
Lorain, Ohio 44052
(216) 245-5232
Counsel for Respondent

Of Counsel:
GUSTALO NUNEZ
Chief Prosecutor
100 W. Erie Avenue
Lorain, Ohio 44052
(216) 244-5663

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STATEMENT OF THE CASE

Respondent, City of Lorain, concurs with petitioners' Statement of the Case in their petition for writ of certiorari, but takes exception to their description of the female defendants-petitioners on page 6 as "professional" dancers.

SUMMARY OF ARGUMENT

This Court has consistently held that states and municipalities have the power to regulate barroom nude dancing pursuant to the Twenty-First Amendment to the United States Constitution.

The Lorain Ordinance properly regulates such nude dancing and does not chill protected expression.

REASONS FOR DENYING THE WRIT

A. The Lorain Ordinance properly regulates public nudity.

Legislative acts are, or course, presumed valid and constitutional. *Illinois v. Krull*, 480 U.S. 340 (1987); *Benjamin v. City of Columbus*, 104 Ohio App. 293 (Franklin 1957), *affirmed*, 167 Ohio St. 103 (1957).

Unlike the state statutes and municipal ordinances contested in other cases, the Lorain Ordinance is narrowly and specifically drawn. Petitioners state that the recent Seventh Circuit decision in *Miller v. Civil City of South Bend*, 904 F.2d, 1081 (1990), is factually indistinguishable and in direct conflict with the Ohio Supreme Court decision below.

In actuality, the statute construed in *Miller* is quite different from the Lorain Ordinance. The Indiana public indecency statute prohibits, *inter alia*, nudity in a public place. The Lorain Ordinance is not nearly so broad in its application.

First, the Lorain Ordinance excepts "theaters" as defined by the Ordinance from its prohibition against unlawful exposure. Also, the section under which petitioners were charged applies only to persons, ". . . . participating in any live act, demonstration, or exhibition. . . .", Lorain Ord. Sec. 533.21.

Therefore, the language of the Lorain Ordinance avoids two major problems present in other broader statutes. The "theater" exception would not prohibit mere nudity in a play, opera, musical or similar setting. In addition, the fact that the ordinance applies only to those involved in a live act, performance or exhibition, abrogates the possibility of prosecution of innocuous

nudity in, for example, a high school locker room. Therefore, the Lorain Ordinance allows free and full expression without the fear of overbroad application. It is a valid time, place and manner regulation.

The Ohio Court of Appeals accurately stated, "[t]he possibility that the Lorain Ordinance will chill protected expressions is, at best minimal . . . ." *City of Lorain v. Gina M. Davidson, et al.*, Pet. App. at A14.

B. Certiorari is Inappropriate Since the Ohio Supreme Court's Decision is in Full Accord With Holdings of this Court.

Petitioners argue that there is widespread conflict between and among state and federal courts concerning the prohibition or regulation of nude dancing.

Petitioners cite several state court decisions which purportedly hold that nude dancing may be prohibited because it is mere conduct and lacks expressive content sufficient to be afforded First Amendment protection; *City of Portland v. Derrington*, 253 Or. 289, 451 P.2d 111, *cert. denied*, 396 U.S. 901 (1969); *Major Liquors, Inc. v. City of Omaha*, 188 Neb. 628, 198 N.W.2d 483 (1972); *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1980); *Gabriele v. Town of Old Orchard Beach*, 420 A.2d 252 (Me. 1980). However, each of the above decisions is at least ten years old and have certainly been modified by subsequent decisions of this Court.

Petitioners indicate that the decision of the Ohio Court of Appeals below, which was affirmed by the Ohio Supreme Court, followed the above-cited cases. Neither Ohio decision cited any of these cases nor did the Ohio courts hold that nude dancing was mere conduct. In fact,

the Ohio Court of Appeals strongly implied that nude dancing is afforded some measure of First Amendment protection, consistent with holdings in this court. *City of Lorain v. Gina M. Davidson, et al.,* Pet. App. at A9.

The Ohio Supreme Court decision does not conflict with recent decisions of this Court or the various circuits. The Twenty-First Amendment to the United States Constitution grants broad powers to the State of Ohio and its municipalities to regulate liquor-related activities. This Court has determined that such powers outweigh First Amendment interests in nude dancing. *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 933 (1975); *California v. LaRue,* 409 U.S. 109, 118 (1972). The Ohio Supreme Court correctly decided that the Lorain ordinances were constitutionally applied to the defendants, because their activity took place within a liquor establishment.

Petitioners' statement that decisions of this Court, federal circuit courts and state courts are in conflict is erroneous. The *Miller* cases cited by petitioners does not recognize such conflicts. In fact the Court states, ".... the Supreme Court, along with several circuit and district courts, has repeatedly and consistently intimated that nude dancing performed as entertainment is protected activity under the First Amendment...." *Miller, supra* at 1082.

On this basis, the Ohio Supreme Court is not in conflict with the Seventh Circuit, nor is it in conflict with prior holdings of this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARK J. MIHOK
Counsel of Record
100 W. Erie Avenue
Lorain, Ohio 44052
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Counsel for Respondent

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Chief Prosecutor
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